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Reid, Colin

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Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy
Ceri Warnock
(Hart) £75

Around the world, many countries have been establishing specialist environmental courts and tribunals, with enthusiastic support in much of the academic literature. Yet in the jurisdictions where they have perhaps been most strongly developed, the acceptability of such courts continues to come under criticism. It is this mismatch which lies behind Warnock's attempt to identify an underlying theory that justifies the legitimacy of specialist environmental adjudication.

Her answer is that the legitimacy of environmental courts should be seen as resting on a legal integrity that responds to the inherent nature of the problems they are charged with resolving. The case for their acceptance is based on coupling the formal legitimacy derived from the courts being created and operating under established legal rules with a responsiveness to the task to be undertaken. This argument is developed with examples from across the world, drawing especially on the rich experience of the New Zealand Environment Court and the new South Wales Land and Environment Court.

What makes environmental issues so special that they require a distinct approach to adjudication? Several features are put forward: the dynamic nature of ecosystems, the unavoidable scientific uncertainty, the polycentricity of problems, the different sorts of impacts of (physical, economic, socio-cultural) on many parties who additionally may not share the same world-view (ethical pluralism). Such features mean that cases do not lend themselves to decision-making based on definite rules, so that no clear and fixed law-policy divide can be maintained. Furthermore, the resolution of disputes often requires forward-looking decisions governing an evolving situation, where human intervention (including through the courts) is one of the factors shaping the position. Environmental adjudication is thus "a completely different species" from other forms of public law activity.

Environmental courts, Warnock argues, cannot work in the same way as other courts due to these special features of environmental issues. In assessing factual situations their role requires an assessment of risk, where both the likelihood and seriousness of consequences must be taken into account, rather than judging on the basis of a balance of probabilities as many other courts can. Creativity is required in finding ways of gathering and assessing evidence of the uncertain and dynamic picture and in engaging all the parties with an interest in the matters. Moreover, much environmental legislation in itself poses specific challenges, relying on principles and broad objectives, without containing precise rules on how these are to be operationalised in particular circumstances.

There are critics of specialist courts, but it is argued that many of these are judging them against inappropriate standards. The fact that the courts' role can be seen as part administrative and part judicial is not a novelty – until last century many governmental bodies had such dual roles (the historic role of swanimotes in English forests is provided as one example) – and arguments that this offends against the separation of powers are misplaced in jurisdictions like the UK and those that have followed its model where a rigid separation is not a core feature of the constitutional set-up. Instrumentalist criticisms, arguing that decisions could be made more quickly and efficiently by other bodies and procedures, miss the point by failing to respect the nature of environmental decision-making.

Doubts over specialist environmental courts, it is argued, can be addressed through several stages: identifying the distinct characteristics of environmental problems, acknowledging the challenge

these pose for law and dispute resolution, developing legal principles, procedures and remedies that respond to this challenge and understanding how the forms and procedures for adjudication can address these challenges. On this basis a foundation for environmental adjudication can be constructed that establishes the legitimacy of specialist environmental courts.

This strong argument for the creation and maintenance of environmental courts is particularly timely for Scottish readers. The review of environmental governance mandated by the UK Withdrawal from the European Union (Continuity) Act 2021 expressly calls for consideration of "whether and, if so, how the establishment of an environmental court could enhance … governance arrangements" (s.41(2)(c)). The next few years will therefore see renewed debate on this topic, which has not been done justice in previous government reviews (see (2016) 174 SPEL 26).

The book, in particular, calls on us to focus on what tasks any such court might be called on to fulfil. The detailed examination of the experience of the New Zealand and New South Wales courts emphasises that their role includes consideration of the merits of cases, not just the legality of decisions taken by regulators. They are therefore doing a job that here is often in the hands of Ministers or planning reporters, leaving the courts with a much more limited (and it could be argued more conventionally "judicial" role). The debate to be had is therefore as much about function as form, which is central to the responsiveness that is argued for in this book.

That debate will be enriched not only by Warnock's own argument but also by an understanding of the wider picture that she provides so well. This comes directly from her discussion of the antipodean jurisprudence and indirectly through the wealth of references to both the practical experience elsewhere and the conceptual debates that continue to surround environmental law and adjudication. This book is an excellent and stimulating way to prompt thinking about a big subject that will be very much a live issue in the coming years.

Colin T Reid,
University of Dundee